

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ADLENA YOUNG	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	No. 97-CV-2043
	:	
MARRIOTT INTERNATIONAL, INC.,	:	
Defendant,	:	
INREVCO ASSOCIATES, L.P.,	:	
a Pennsylvania Limited Partnership,	:	
Defendant and	:	
Third-Party Plaintiff, and	:	
INREVCO ASSOCIATES, L.P.,	:	
a New Jersey Limited Partnership,	:	
Defendant and	:	
Third-Party Plaintiff	:	
	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	
Third-Party Defendant	:	

MEMORANDUM-ORDER

GREEN, S.J.

October , 1997

Presently before the court is Third-Party Defendant United States of America's unopposed Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). For the reasons set forth below, Third-Party Defendant's Motion will be granted.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Adlena Young is seeking damages for injuries sustained by a slip and fall accident on the cafeteria floor at the Internal Revenue Service Center at 11601 Roosevelt Boulevard ("IRS Center") on November 10, 1994. In Marriott's Report of the Accident, the Plaintiff stated that the cafeteria floor felt like it had something slippery on it. Third-Party Defendant's Memorandum of Law, Exhibit 3. The building is owned by Defendant

Inrevco and leased by the General Services Administration ("GSA") for the use of the IRS. The cafeteria was operated by Defendant Marriott, an independent contractor, under a concession agreement between Marriott and GSA.

The contract between Marriott and GSA provided that Marriott was responsible for all management, supervision, labor, materials, supplies and equipment for cafeteria food services in the IRS Center. Third-Party Defendant's Memorandum of Law, Exhibit 6, Solicitation, Offer and Award, at 12. Specifically, Marriott was responsible for "maintain[ing] the cafeteria concessions areas in a clean, orderly, sanitary condition at all times." Id. at 24. Furthermore, the contract states that "spillage clean up will be the responsibility of the food service contractor," Id. (emphasis in original), and that Marriott is responsible for "hazardous conditions that are dangerous to anyone using the food facility." Id. at 26. Marriott was dismissed from the case via Stipulation of Dismissal between Plaintiff and Marriott on July 23, 1997.

DISCUSSION

At issue in a Rule 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case. Mortensen v. First Federal Savings and Loan Association, 549 F.2d 884, 891 (3d Cir. 1977). The plaintiff has the burden of proving that jurisdiction does in fact exist. Id. "No presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial

court from evaluating for itself the merits of jurisdictional claims." Id.

The United States, as sovereign, is immune from suit unless it consents to be sued, and the terms of its consent define the court's jurisdiction to entertain the suit. United States v. Testan, 424 U.S. 392, 399, 96 S. Ct. 948, 953 (1976). The Federal Tort Claims Act ("FTCA") is a limited waiver of sovereign immunity which gives the district court exclusive jurisdiction over civil actions for negligence or wrongful act claims against any employee of the Government while acting within the scope of his office or employment. See 28 U.S.C. § 1346(b). The FTCA defines federal employees as "officers or employees of any federal agency. . . ." 28 U.S.C. § 2671. A federal agency for FTCA purposes is "the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States. Id. (emphasis added).

Critical in distinguishing an agency from an independent contractor is the power of the United States to control the detailed physical performance of the contractor. United States v. Orleans, 425 U.S. 807, 814, 96 S. Ct. 1971, 1976 (1976). Under the independent contractor exception to the FTCA, the United States may not be held liable for the actions of contractors unless the Government supervises the day to day

operations of the contractor. See Norman v. United States, 111 F.3d 356, 357 (3d Cir. 1997). Where a contractor is given broad responsibilities for daily maintenance, the United States may not be held liable for the alleged negligence of that contractor. See id. at 357. The independent contractor exception of § 2671 also shields the United States as the owner and possessor of the building from state tort liability under Pennsylvania law. See id. at 358 (citing Berkman v. United States, 957 F.2d 108, 112-13 (4th Cir. 1992)).

In the present case, the contract between Marriott and GSA provided that Marriott had broad responsibility for the daily activities of the food services cafeteria at the IRS Center. As related to the Plaintiff's slip and fall accident, the contract specifically stated that Marriott was responsible for spillage clean up and for preventing and correcting any hazardous or dangerous conditions in the cafeteria. This court concludes that Marriott was an independent contractor for purposes of the FTCA, and, pursuant to the independent contractor exception under § 2671, the United States may not be held liable for any alleged negligence on the part of Marriott. Because the United States has not waived its sovereign immunity with respect to claims alleging negligence on the part of independent contractors, the United States is immune from the present suit. Accordingly, Third-Party Defendant United States of America's Motion to Dismiss For Lack of Subject Matter Jurisdiction is granted.

An appropriate Order follows.

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	:	
v.	:	
	:	
UNITED STATES OF AMERICA	:	
Third-Party Defendant	:	

ORDER

AND NOW, this day of October, 1997 upon consideration of Third-Party Defendant United States of America's unopposed Motion To Dismiss For Lack of Subject Matter Jurisdiction, IT IS HEREBY ORDERED that Third-Party Defendant's Motion is GRANTED and the Third-Party Complaint is DISMISSED WITH PREJUDICE.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.